IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

No. 218.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Appellant,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, Chairman and State Legislative Representative, and ILLINOIS COMMERCE COMMISSION.

Appeal from the Supreme Court of the State of Illinois.

REPLY BRIEF FOR APPELLANT.

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SUBJECT INDEX.

	Page
Answer to appellees' addition to statement	1
Answer to introductory statement in argument	11
Answer to point I of appellees' argument	12
Answer to point II of appellees' argument	15
Answer to point III of appellees' argument	17
Conclusion	18

Cases Cited.

California v. Thompson, 313 U. S. 109, l. c. 113 ..... 12, 13
Chicago R. Co. v. State, 90 Okl. 173, 217 P. 147 16
K. C. R. R. v. Kaw Valley etc., 233 U. S. 75-78 ..... 4, 12
Lemke v. Farmers Grain Co., 258 U. S. 50, l. c. 59 ..... 12, 13
Lowden v. Illinois Commerce Commission, 376 Ill. 225; l. c. 230-231 3
L. & N. R. Co. v. Brasher, 289 S. W. 1094, 217 Ky. 439 16
Minnesota Rate Cases, 230 U. S. 352, l. c. 396 ..... 12, 13
N. Y. C. R. Co. v. Public Utilities Com. of Ohio, 164 N. E. 427, 119 Ohio State 427 16
Oregon R. R. & N. Co. v. Fairchild, 224 U. S. 510 18
Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U. S. 613 17
Penn. Coal Co. v. Mahon, 260 U. S. 393 17
People ex rel. v. Public Service Com. of New York, 234 N. Y. S. 342, 226 App. Div. 43 16
So. Covington & Cincinnati St. Ry. Co. v. Covington, 235 U. S. 537 12
State v. Seaboard Air Line Ry. Co., 104 So. 602, 89 Fla. 410, 39 A. L. R. 1362 16

Statute Cited.

Interstate Commerce Act, Sec. 1, Par. 17, U. S. C. A., Title 49, p. 120 16

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REPLY BRIEF FOR APPELLANT.

Counsel for appellees have filed a brief in this cause. It is our purpose to file a short reply brief in answer to it.

ANSWER TO APPELLEES' ADDITION TO STATEMENT.

Appellees have seen fit to make a complete restatement of the case, although in most instances they concede our statement to be correct. The main additions to the statement consist of a defense on the merits of the Commission's order, and an attempt to point out certain alleged misstatements in our statement.

We concede that in our brief we were confined to the purely federal questions involved. Before the Commission and in the state court we raised many matters not involving federal questions that are not properly cognizable here. While we did not agree with the findings of the Illinois Supreme Court on these points, we thoroughly appreciate that they have been conclusively determined against us by the State Supreme Court, and that we are confined in this court to the one point, that the decision and order drawn in question in this case is repugnant to the Constitution and laws of the United States.

In their statement counsel have grossly exaggerated the use and need of cabooses. We realize that there are some hazards that exist without a caboose that do not exist with one. However, as we pointed out in our brief (pp. 14, 15), the distances between yards are not great; none of the crew would use a caboose except the rear switchman (see Finding 20, R. p. 9), and he would use it only between yards; that the running time between yards was from eleven to thirty minutes, and that the balance of the time the caboose would not be used by any member of the crew; and that under these circumstances we computed that the caboose would only be used from one-sixth to one-eighth of the time by the one switchman during each eight-hour period of work. Furthermore, the rear switchman does no clerical work, but that is done by the foreman, who rides the front end of the cut. We also pointed out that on the longer runs cabooses are furnished; that the rear switchman has no equipment except a lantern by night and a flag by day, which he constantly uses, and therefore needs no place to store them. We also showed that the men report for and quit work at the same place, and that there are sixteen service stations in the three yards in Illinois, located at various places in the yards, and providing ample facilities for the storage of street clothes, lunches, etc., and that there is a seat box in the engine for that purpose.

It is also urged by appellees that this order is for the benefit of the public. The answer to this contention is two fold: First, all of the duties that a switchman would perform, so far as the public is concerned, would be performed when not in a caboose, and, secondly, the findings of the Commission (R. 8 to 12) conclusively show that this order is based solely upon the alleged hazards and perils to switchmen, and that the Commission did not enter the order based on any findings as to the safety or convenience of the public. Under the Illinois law, an order of the Commission must and can only be based on findings contained in the order. Lowden v. Illinois Commerce Commission, 376 Ill. 225, l. c. 230-231.

We also showed in our brief (p. 15) that in nine years only sixteen accidents had happened to switchmen riding on the rear end of trains, and that, of these, eight accidents happened while the employees were actually riding in cabooses, one while riding on the rear end, viz., on the drawbar, and seven while riding on cars.

While it is true that some of the lines, as does appellant, around St. Louis use cabooses on certain runs, we conclusively showed that very few of the lines around St. Louis use cabooses in deliveries to appellant.

Appellees on page 7 of their brief contradict our statement that the record shows conclusively and without contradiction that it would be impractical railroading to cut off or couple a caboose on the bridges at the middle of the river. We did not say it would be impossible to do this, but we did say that, as a practical railroading matter, it would be impossible to cut off and couple cabooses on the bridges at the state line at the middle of the river.

It is true that it might be possible to build crossovers and leave the cabooses on one of the two main tracks at or near the middle of the river, but as we conclusively showed, this could not be done as a practical railroading proposition.

We again respectfully call the Court's attention to our discussion of this question on pages 7, 8 and 9 of our original brief, and particularly to the testimony of the chief railway inspector of the Commission (R. 99), who stated that as a practical proposition to put cabooses on the runs across the river would require them to be hauled on over to St. Louis on runs from Illinois and put on the trains on the runs in Missouri to bring them into Illinois, and that if a caboose was taken to the middle of the river on either side of these bridges, either westbound or eastbound, as a practical railroading proposition it would be necessary to take them on to the other side of the river.

Furthermore, it must be remembered that a minimum of 136 trains cross each of these bridges each day; and even if crossovers could be constructed, with an average of a train each ten minutes on each bridge, it would not be possible to cut off a caboose and leave it on one of these main tracks used by this vast number of trains until a train came from the opposite direction and coupled on to the caboose. This would completely block the main line on the bridge used exclusively for interstate commerce and would fall within the prohibition of the rule laid down in K. C. Sou. Ry. v. Kaw Valley, 233 U. S. 75.

We do not go into great detail on this subject, because we covered it so fully in our brief (pp. 7, 8, 9, 10, 11). It is not a question of the cheapest way being the most practical way, as stated on page 8 of appellees' brief. It is simply a question of not being able to do the thing at all as a practical railroading proposition.

Furthermore, on page 8 of their brief, counsel for appellees say that there is no proof whatever in support of our statement contained on page 11 of our original brief that the furnishing of cabooses has always been considered a working condition. Again, we call attention to the fact that the furnishing of cabooses has always been consid-

ered a working condition and has been dealt with as such by appellant and the switchmen, and cabooses have always been since 1910 and are now being furnished by reason of written contracts between the Brotherhood and appellant (R. 82). On this question the record is clear (R. 79, 81, 82). In 1910 three cabooses were furnished by agreement (R. 81), and these were gradually increased by further agreements with the Brotherhood until at the time of the trial of this case, thirty-one cabooses were in actual use. In each instance these agreements were made with the men through the Brotherhood representatives, and the current agreement is shown in the record in full (R. 82), and it clearly recognizes the matter of furnishing of cabooses to be a working condition, and that it had always been treated as such. In addition to this, it is obvious that the question of whether or not cabooses are furnished for the sole use of the employes and as a means or method of doing their work clearly constitutes a working condition.

Furthermore, it is said in appellees' brief (pp. 8, 9) that all of the testimony of appellant relative to delay and cost was purely hearsay, and an isolated statement is quoted from the record (R. 142) as to the delay in one run, viz.: the run to the Pennsylvania yard, where the witness stated that he did not know of his own knowledge but that he was taking the word of his employes for it. This witness was the superintendent of appellant, having full knowledge of switching operations, and while it is true that as to the delays in the Pennsylvania Yard his knowledge was gained by hearsay, yet his testimony as to the delays on all other runs was from actual knowledge and observation. Furthermore, appellant produced its three general yardmasters in Illinois—L. E. Knight (R. 135), R. D. Parish (R. 130) and Walter H. Rolen (R. 122), all of whom corroborated the superintendent's testimony as to the average delay occasioned by the furnishing of cabooses. In addition, F. M. Heinlein, yardmaster for the

Pennsylvania Railroad, testified (R. 116) as to the delays in the Pennsylvania Yard and as to appellant's runs to and from this particular yard. He testified (R. 119) that there would be an average delay of between fifty minutes and one hour on a forty-car train from appellant's yards and taking a cut back with a caboose over what there would be without one, and that the maximum or top figure of delay would exceed one hour, not including any delay in appellant's own yard.

On page 9 of their brief counsel also attack the statement contained on page 13 of our brief that the initial cost of new cabooses would be $44,000.00, according to the testimony of the Commission's inspector. A reading of the quotation contained will show that we stated the facts, viz., that as estimated by the witness the initial cost of new cabooses would be $44,000.00 and that the extra annual expense in wages would be about $62,000.00, but that this estimate did not include anything except wages. It is said that this statement is neither fair nor accurate. We can see no distinction, as claimed by appellees, between the cost of new cabooses being $44,000.00 and the total investment being that amount. We never said, and do not say now, that the cost of new cabooses would be $44,000.00 each year, or that appellees' witness ever made that statement. We did say that he testified that the initial cost of the new cabooses needed would be $44,000.00, and that estimate was based on shelter cars and not on cabooses.

Furthermore, it is said that the Commission's inspector testified that the annual extra expense in wages for the handling of added cabooses would be something over $27,000.00 and not $62,000.00, as stated by us. We covered this matter rather thoroughly on pages 12, 13, 14 and 15 of our original brief and will not repeat those statements here, but will content ourselves with a defense of our statement, as shown by the actual testimony in this case.

Our brief conclusively showed that our testimony demonstrated that the original cost of new cabooses would be at least $150,000.00, and that the added annual expense would be at least $250,000.00. It is true that Inspector Thomas (R. 201) gave a summary of three sections of his report, without giving specific reference to the yards, as showing an extra annual amount in wages of $27,777.22. However (R. 186), he shows the miximum extra wages alone for the Madison Yard to be approximately $30,000.00, the maximum extra wages alone for the Wiggins Yard No. 2 to be more than $13,000.00, and (R. 200) the extra wages for the C. D. Yard to be $7,000.00, or a total of more than $50,000.00. It is impossible from Thomas' report to get his hypothetical figures as to minimum, actual, and maximum costs and reconcile the figures in one place in his report with other places. An examination of his entire report, as nearly as can be figured out accurately, shows under his testimony that the maximum delay would result in an outlay of about $62,000.00 per year for wages alone. Furthermore, this covered only wages, and it will be noted (R. 186) that Thomas stated in his report that the total annual operating expense for cabooses would be approximately two and one-fourth times the estimated annual crew wages for handling cabooses. Whether we take the figure at $27,000.00 or $50,000.00 or $62,000.00, when we multiply that by two and one-fourth we get annual extra cost of using cabooses of $60,000.00, $112,000.00 and $139,000.00, as opposed to our testimony of an expense of $250,000.00. It is immaterial here as to which of these figures we use—any one of them would be sufficient to support our contentions on the questions raised in this court.

Furthermore, counsel say that the estimates given by the Commission's expert were not hearsay, but were the result of ten or fifteen days spent by the witness in appellant's yards, riding various cuts in company with various

railroad officials. We have heretofore in our original brief shown the "show run" character of these so-called tests; and even with a much less delay than would result in actual switching, the witness' figures result as above set forth.

Furthermore (R. 166), appellant handled in 1938 an average of 60,000 cars a week, or a total for the year of 3,119,000 cars.

Counsel further says that our statement that the minimum delay, as shown by the undisputed testimony, would average at least eleven minutes per run is not correct; and they say that the record shows that the minimum handling time would be eleven minutes, and that there is a distinction between handling time and delay. We cannot see the distinction. If it takes a minimum of eleven minutes to handle a caboose that it would not have taken if a caboose was not handled, then necessarily there is eleven minutes added to the time necessary to transport a cut of cars from point of origin to point of destination. It must be remembered that appellant's evidence, based on actual experience, showed an average delay of forty minutes per run.

Appellees further deny our statement that the Supreme Court of Illinois found that the delay on each run would be from eleven to forty minutes, and quote from the decision of the Supreme Court on that point exactly as we did. We call attention to the quotation from the opinion contained on page 10 of their brief, and if we can read the English language at all, the Supreme Court of Illinois found that while the evidence before the Commission as to the amount of time consumed was in conflict, yet the evidence showed that it ranged from eleven minutes to forty minutes per movement. The Supreme Court also stated that appellees here concede that some time was required to add a caboose to these cuts of cars. We submit that this is a finding by the Supreme Court of Illinois that the mini-

mum delay, as shown by the evidence, was eleven minutes and the maximum forty minutes per run.

We have heretofore answered the statement made on page 10 of appellees' brief relative to the period of time that the rear switchman would use a caboose.

Counsel also complain concerning our statement that the caboose would only be used by one employe out of five in each run. It is true that a witness (R. 221) said that a switching crew consists of three men. And it is said that we have misquoted the evidence when we state that the caboose would be used by only one employee out of five in each run. It is true that there are three switchmen to each run, but there are also an engineer and a fireman on each run. The caboose would only be available for use by the rear switchman and the other two switchmen ride on the front end of the train, and, of course, the engineer and fireman ride on the engine. In fact, one of the witnesses for the Brotherhood testified (R. 21) that a minimum single crew was three switchmen and the maximum five, and that this did not include the engineer and fireman.

It is also said that all of the crew could use the caboose for equipment, temporary shelter, etc. We have clearly shown heretofore in this reply and also in our original brief that none of the crew could or would use a caboose except the rear switchman, and that he would be exposed to all hazards of switching with a caboose, except when the runs were being made between two yards of appellant. None of the crew had any need for a place to store equipment other than was furnished. They would have to ride on icy cars while switching in the yard; they would have to encounter the hazards of switching, except the rear switchman would have a place to ride between yards. The findings of the Commission (R. 8 to 12) clearly sustain our contention that a caboose would only be used by the rear switchman.

As to clearances, while it is true that the clearances are not good on the two bridges, yet there are no great hazards from improper clearances at any other places, as shown by the record.

Lastly, so far as the statement is concerned, reference is made to our argument concerning the financial losses of the company; and it is said that appellant earned over $1,100,000 in 1928, and also that it earned over $700,000 in 1939. There is not a particle of evidence in this record as to any earnings in 1939. The evidence in this case concerning earnings was taken in 1939 (R. 229). Furthermore, from 1930 to 1937, both inclusive (R. 229), there was a deficit in each year except one, and then the net earnings were only $19,000.00. The deficits for these years ranged from $123,000.00 to $1,127,000; and even if, as shown by this exhibit (R. 229) we include the years 1928 and 1929, when appellant made more than $1,800,000 for the two years, yet the deficit for the ten years from 1928 to 1937, even including these two good years and the year 1935 when a small profit was made, amounts to $1,191,000, or an average annual deficit for the ten-year period of $119,000.00.

Furthermore, it is said in appellees' brief (p. 11) that appellant could have operated and made more money even during these bad years. There is not a particle of evidence in this record to sustain this statement.

We have not answered all of the matters set forth in appellees' statement for the reason that in most instances we have conclusively shown in our original brief the truth of our statement and the falsity of the objections to it.

ANSWER TO INTRODUCTORY STATEMENT IN ARGUMENT.

So far as the distinction made in the Wickard case is concerned, all the Wickard case holds is that where Congress has legislated with respect to interstate commerce, its action is complete and all inclusive; that Congress can preempt the field of interstate commerce by legislation even though its regulation may affect intrastate commerce. The gist of the Wickard case is that it applies to federal powers only, although it does to some extent lessen the difference between direct and indirect interference with interstate commerce.

Under this heading counsel have sought to divide state regulation into two classes. As to one of these classes, they contend that state regulation would be void and as to the other they contend that it would be valid when exercised under the police power, unless the burden that it lays upon interstate commerce is unreasonable in contemplation of the object sought to be obtained or it is in conflict with the actual exercise of congressional power. As we have shown in our original brief, and shall later amplify in this reply, there is no such division of power, nor can legislation of the state be sustained under the police power if the necessary and practical effect of it is directly to delay, obstruct or burden interstate commerce, or necessarily to give to such legislation an extra-territorial effect so as to require its observance in another state.

It is not a question of the reasonableness of the legislation, but it is a question of whether it directly delays, obstructs or burdens interstate commerce or has an extra-territorial effect.

ANSWER TO POINT I OF APPELLEES' ARGUMENT.

Under this heading counsel lay down the premises that the regulation in question is a reasonable exercise of the State's police power and imposes no unconstitutional burden on interstate commerce. In support of this argument counsel advance a major and a minor premise. Under the major premise it is argued that if the order in question is not in conflict with applicable federal legislation, it must be sustained if it is a reasonable measure having for its purpose and legitimate object the preservation of life, health and the promotion of safety, and, if so, it may be enforced with respect to interstate commerce. As we have pointed out in our original brief, this is not the true test to determine the validity of legislation. This premise, as stated, is erroneous in not including the following conditions: It must not have an extraterritorial effect. So. Covington & Cincinnati St. Ry. Co. v. Covington, 235 U. S. 537. It must not materially obstruct the free flow of commerce. K. C. R. R. v. Kaw Valley etc., 233 U. S. 75-78. It must not directly burden, delay or obstruct interstate commerce. Lemke v. Farmers Grain Co., 258 U. S. 50, l. c. 59, and other cases cited in our original brief. It must not materially obstruct the free flow of commerce between the states. California v. Thompson, 313 U. S. 109, l. c. 113.

As was stated by this Court in Lemke v. Farmers Grain Co., supra, on p. 58:

> "This principle (meaning the police power) has no application where the state passes beyond the exercise of its legitimate authority and undertakes to regulate interstate commerce by imposing burdens upon it."

Furthermore, in the Minnesota Rate Cases, 230 U. S. 352; l. c. 396, Mr. Justice Hughes, speaking for the Court, said:

> "If a state enactment imposes a direct burden on interstate commerce, it must fall regardless of federal legislation. The point of such an object is not that Congress has acted, but that the state has directly restrained that which, in the absence of federal regulation should be free."

In the Lemke case, supra, l. c. 59, this Court reaffirmed the doctrine of the Minnesota Rate Cases, and, quoting from page 400 of the latter opinion, said:

> "'"The principle, which determines this classification (between federal and state power), underlies the doctrine that the States cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the States are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains."'

We particularly call the Court's attention to the recent pronouncement of this Court in California v. Thompson, supra, and to the quotation therefrom appearing as a footnote on page 19 of appellees' brief.

But it is said by counsel because the Court has held that a state may license trainmen, that it may define the size of crews manning interstate trains within the state, that it may prescribe regulations for payment of wages, that it may require interstate passenger cars in the state to be heated, that it may regulate the speed of interstate trains within city limits, that it may require interstate railroads to eliminate grade crossings, that it may pass local quarantine laws applicable to merchandise moving in interstate commerce, and that it may regulate the use of its harbors and navigable waterways, that therefore the present order is valid in the exercise of the police power of the state. However, in none of these cases did

the legislation have an extra-territorial effect, in none of them was the free flow of commerce materially obstructed and in none of them was there any direct burden, delay or obstruction to interstate commerce.

Counsel also attack our construction of the South Covington case, supra. We discussed this case thoroughly in our original brief (pp. 48 to 52), and we refer the Court to that part of our brief and to the opinion itself in support of our interpretation of the case. The quotation from the opinion on page 49 of our brief clearly shows that the determination of this question must not be upon what the order purports to require, but upon what will result from its practical application in railroad operations. We further call the attention of the Court to the quotation from the opinion in the South Covington case appearing on page 50 of our original brief to the effect that that part of the ordinance relative to the maximum number of passengers and the minimum number of cars was held invalid because of the necessary extraterritorial effect of those provisions. It is said that the Covington case is authority for appellees' position because of the fact that the ordinance provisions relative to passengers riding on the rear and front platforms unless suitable barriers or rails were provided was sustained.

As to the provision concerning passengers riding on the platforms unless suitable barriers or rails were provided, this did not necessarily have an extraterritorial effect. The street car company was merely prohibited in Covington, Kentucky, from allowing passengers on these platforms unless these barriers or rails were provided; if it did not provide them, the passengers necessarily would be compelled to ride inside the car, but if they were provided then they could ride on the platforms. However, when the state line was reached, even though not provided with barriers or rails, there would be no reason why any passenger who wanted to could not ride upon either platform.

As to the provision for heating cars, this Court held that invalid, not on any question concerning interstate commerce, but upon the sole ground that it was impossible and impracticable in actual operation and therefore unreasonable.

Appellees' minor premise is merely that the instant order is such a reasonable exercise of the state's police power as to be within the rule stated in the major premise. In our original brief we have fully discussed this argument.

ANSWER TO POINT II OF APPELLEES' ARGUMENT.

Under this heading counsel contend that Congress has not by affirmative action pre-empted the subject matter of the present order from the jurisdiction or powers of the state. In our original brief we discussed this question rather fully and cited decisions of this Court in support of our contention. As to most of appellees' argument under this heading it would be mere repetition of our original argument if we answered it fully and in detail. There are several inherent defects, however, in appellees' argument.

We pointed out in our brief (p. 29) that if Congress has taken charge of the field a state cannot legislate in that field, even though the effect upon interstate commerce is indirect, and even though Congress has not legislated as to the particular matters involved. The question is whether Congress has taken possession of the field, and it is immaterial whether it has legislated concerning a particular matter within the field. Furthermore, it is not a question of whether the Interstate Commerce Commission or the Railway Labor Board have exercised the powers given to them by Congress by the issuance of regulations and orders. The true question is whether or not Congress has conferred that power upon the Commission and the Board. If it has, then the states are powerless to legislate

in that field, even though the effect on interstate commerce be indirect and incidental. The whole matter is a question of power and not whether the administrative bodies upon whom the power has been conferred have actually exercised it in the particular case.

On pages 32 and 33 of appellees' brief, Sec. 1, Paragraph 17 of the Interstate Commerce Act, U. S. C. A. Title 49, p. 120, is cited. This section provides that nothing in this chapter (meaning the Interstate Commerce Act) shall impair or affect the right of a state in the exercise of its police power to require just and reasonable freight and passenger service for interstate business, except insofar as such requirement is inconsistent with any lawful order of the Commission made under the provisions of the chapter. This proviso applies only to just and reasonable freight and passenger service, which necessarily means service to the public and does not otherwise limit the effect of the act so far as it excludes power being conferred by Congress on the Commission to act. We have been able to find no Federal cases construing this section of the statute, but the construction we have given it seems to be the only reasonable construction that can be given to the language used. State cases in which the section has been so construed are: State v. Seaboard Air Line Ry. Co., 104 So. 602, 89 Fla. 410, 39 A. L. R. 1362; L. & N. R. Co. v. Brasher, 289 S. W. 1094, 217 Ky. 439; Chicago R. Co. v. State, 90 Okl. 173, 217 P. 147, and N. Y. C. R. Co. v. Public Utilities Com. of Ohio, 164 N. E. 427, 119 Ohio State 427; People ex rel. v. Public Service Com. of New York, 234 N. Y. S. 342, 226 App. Div. 43.

If Congress had intended to permit concurrent legislation by the state, it would have provided for that in the act itself. On this point we again call attention to the Illinois Natural Gas Company case, and the Clover Leaf Butter Company case, cited on page 43 of our original brief.

ANSWER TO POINT III OF APPELLEES' ARGUMENT.

Under this heading counsel contend that the order in question does not deprive appellant of its property without due process of law. This matter has been fully argued in our original brief and a large number of cases have been cited in support of our position. We do, however, desire to call the Court's attention to three cases cited in our original brief:

In Penn. Coal Co. v. Mahon, 260 U. S. 393, the owner of land containing coal deposits had deeded the surface with express reservation of the right to remove all the coal beneath, the grantees assuming the risk and waiving all claim to damages that might arise from such mining, and the property rights thus reserved, and contracts made, were valid under the state law, and a statute, enacted later, forbade mining in such way as to cause subsidence of any human habitation, or public street or building, and thereby made commercially impracticable the removal of very valuable coal deposits still standing unmined. It was held that the prohibition exceeded the police power, whether viewed as a protection to private surface owners or to cities having only surface rights, and contravened the rights of the coal owner under the contract clause of the Constitution and the due process clause of the Fourteenth Amendment.

In Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U. S. 613, a statute of Kansas was involved, which, as construed by its courts, authorized the State Highway Commission to order a pipe line, at its own expense, to relocate and make certain other changes in its pipe and telephone lines, then located on a private right of way, to conform to plans adopted for new highways to

cross the right of way. This Court held that such statute deprived the company of its property without due process of law.

In Oregon R. R. & N. Co. v. Fairchild, 224 U. S. 510, this Court set aside an order of the Oregon Commission, requiring the making of track connections estimated by the railroad company to cost $21,000.00 and by the Commission to cost $7,000.00. It appeared that the connections would develop very little business and that the claimed public benefit would be slight. This Court held the order to be void as an arbitrary and unreasonable exercise of police power, depriving the railroad company of its property without due process of law.

In many of the cases cited on pages 58 and 59 of our original brief the laws were declared valid and in many of them they were declared invalid; but in all of them the test was the same, viz., the relation between the burden of cost and the resulting public benefit.

CONCLUSION.

Appellant, therefore, again asks this Court to reverse the judgment and order of the Supreme Court of Illinois, and to remand the cause to that court, with directions that it enter such orders as may be consistent with such opinion as this Court may render in this case.

All of which is respectfully asked and prayed.

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